3-1-2016

# State v. Gonzalez Appellant's Reply Brief Dckt. 42883

**IN THE SUPREME COURT OF THE STATE OF IDAHO**

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| **STATE OF IDAHO,** | ) | |
| | ) | |
| **Plaintiff-Respondent,** | ) | **NO. 42883** |
| | ) | |
| **v.** | ) | **ADA COUNTY NO. CR 2014-9087** |
| | ) | |
| **ANTONIO CUELLAR GONZALEZ,** | ) | **REPLY BRIEF** |
| | ) | |
| **Defendant-Appellant.** | ) | |
| _____ | ) | |

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# REPLY BRIEF OF APPELLANT

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**APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

_____

**HONORABLE CHERI C COPSEY**
**District Judge**

_____


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## STATEMENT OF THE CASE

### Nature of the Case

Antonio Gonzalez appeals contending the district court erred in denying his motion for mistrial, based on the fact that the prosecutor's minimally-relevant line of questioning unnecessarily risked, and in fact, resulted in, a comment on his invocation of his right to an attorney. Mr. Gonzalez also asserts the district court abused its discretion by concluding it did not have authority to remove a competency evaluation from the presentence (*hereinafter*, PSI) packet prepared in this case because that competency evaluation was part of an old PSI appended to the PSI packet prepared in this case.

In regard to the comment on silence issue, the State contends the prosecutor's line of questioning was acceptable exploration of inconsistencies in Mr. Gonzalez's testimony and the prosecutor did not intend to infer Mr. Gonzalez's guilt from the elicited comment. On the PSI issue, the State asserts that issue is not properly raised on appeal absent fundamental error, and it contends there was no abuse of discretion in the district court's ultimate decision to leave the evaluation attached to the PSI packet without reviewing the evaluation itself.

The State is mistaken. As to the comment on silence issue, while the prosecutor may explore inconsistencies, such questioning is not proper when the defendant has actually invoked his rights. Therefore, such questioning may not go into territory where the prosecutor knows there is a high risk of improper comment on the defendant's invocation of his rights, especially when the probative value of such questioning is minimal. As to the PSI issue, because the district court directly addressed the question

of whether it could remove the competency evaluation, the challenge to that decision is properly raised on appeal. The State's argument on the merits ignores previous Court of Appeals' decisions which not only hold that the district court is authorized to remove improper competency evaluations from PSI packet prepared in this case, but instructs that is precisely what it should do. As such, this Court should grant relief in this case.

Statement of the Facts and Course of Proceedings

The statement of the facts and course of proceedings were previously articulated in Mr. Gonzalez's Appellant's Brief. They need not be repeated in this Reply Brief, but are incorporated herein by reference thereto.

## ISSUES

1. Whether the district court erred in denying Mr. Gonzalez's motion for mistrial.

2. Whether the district court abused its discretion by not ordering a competency evaluation to be removed from the PSI materials.

## ARGUMENT

### I.

### The District Court Erred In Denying Mr. Gonzalez's Motion For Mistrial

The State's primary contention on this issue is that the prosecutor is permitted to explore inconsistencies in the defendant's testimony in cross-examination, and therefore, the prosecutor's questions, which led to the comment on Mr. Gonzalez's invocation of those rights, were not erroneous. (Resp. Br., pp.11-13.) However, as the cases the State cites in support of this assertion subsequently explain, the prosecutor's ability to engage in that sort of cross-examination is not unfettered: "In *Anderson v. Charles*, 447 U.S. 404 . . . (1980), the Court held that the state's cross-examination of a defendant about prior inconsistent statements made at the time of arrest was not prohibited by *Doyle*.[1] *The Supreme Court stressed that the case did not involve a defendant who had relied upon his right to remain silent*." *State v. Urquhart*, 105 Idaho 92, 94 (Ct. App. 1983) (emphasis added). Thus, where the defendant invokes his rights, such questions are still inappropriate.[2] *See id*. As the Idaho Supreme Court has held: "If a prosecutor is allowed to introduce evidence of [a defendant's] silence, for any purpose, then the right to remain silent guaranteed in *Miranda v. Arizona*, 384 U.S. 436 . . . (1966), becomes so diluted as to be rendered worthless." *State v. White*, 97 Idaho 708, 714-15 (1976).

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[1] *Doyle v. Ohio*, 426 U.S. 610 (1976).

[2] The *Urquhart* court ultimately found that error to be harmless based on a standard of harmless error review which, as will be discussed *infra*, the United States Supreme Court subsequently disavowed because it would result in violations of defendants' constitutional right to a trial by jury. *See Urquhart*, 105 Idaho at 95; *compare Sullivan v. Louisiana*, 508 U.S. 275, 279-80 (1993).

Here, as in *Urquhart*, Mr. Gonzalez exercised his right to remain silent by invoking his right to an attorney. Therefore, a full understanding and application of the cases the State cites reveals that, despite the prosecutor's general ability to explore inconsistencies in a defendant's testimony on cross-examination, the prosecutor's questions in this case were, in fact, inappropriate under *Doyle* and *White*.

That conclusion is even more evident given the Idaho Supreme Court's more recent decision in *State v. Ellington*, 151 Idaho 53, 61 (2011), which the State does not acknowledge in its brief. (*See generally* Resp. Br.) In *Ellington*, the Supreme Court held that, when the prosecutor's questions are delving into a minimally-probative area and the prosecutor is aware of the high risk that the questioning will result in an improper comment on the defendant's exercise of his rights, the questioning is improper. *Ellington*, 151 Idaho at 61. Here, as in *Ellington*, there was no reason for the prosecutor to be asking the questions which elicited the comment on Mr. Gonzalez's invocation of his rights, and the prosecutor was aware of the risk that such a comment could be elicited.

Specifically, the problematic line of questioning was asking Mr. Gonzalez to repeat his answers to the officer's questions, a conversation memorialized in an audio recording which had already been admitted as evidence and published to the jury. As such, there was little probative value to the prosecutor's line of questioning because it was merely cumulative. (*Compare* Tr., p.140, L.24 - p.141, L.4 (sustaining an objection to a similar question to the officer for the reason that the jury had already heard the recording of the conversation).) The prosecutor also admitted she was aware this line of questioning presented a high risk of eliciting a comment on Mr. Gonzalez's

invocation, as she claimed, in formulating her questions, she "ha[d] been particularly careful not to let that happen." (Tr., p.329, L.25 - p.330, L.1.) However, as *Ellington* points out, such efforts are not sufficient to justify the risk of asking such questions. *Ellington*, 151 Idaho at 61 (finding error despite the prosecutor's representation "that he phrased the question . . . in a leading way in order to avoid a comment on Mr. Ellington's silence."). Therefore, as in *Ellington*, because there was no justified reason for the prosecutor to be asking those questions in light of the known risk of error, the prosecutor's questions in this case were improper.

The State also argues that the prosecutor did not attempt to infer Mr. Gonzalez's guilt from the elicited comment on his invocation. (Resp. Br., pp.13-14.) However, that argument is contradicted by the prosecutor's statements to the district court: The prosecutor said her aim with this line of questioning was to show Mr. Gonzalez was "in a position to tell [the officers], if he wants to, that there was self-defense. He's now making up self-defense that didn't exist before after having the opportunity to look at the report . . . ." (Tr., p.331, Ls.1-7.) Therefore, the prosecutor's expressed purpose was to infer Mr. Gonzalez's guilt (that he hit Mr. Steele *without legal justification*) because he chose not to tell the officers about the alleged self-defense claim (*i.e.*, because he invoked his right to an attorney) on the night of the incident. The State's argument to the contrary is meritless.

Furthermore, the fact that Mr. Gonzalez had made other statements to the officers prior to his invocation (*see* Resp. Br., p.14 (focusing on Mr. Gonzalez's "what fight" statements)) is ultimately irrelevant to whether the prosecutor's final question – "Does somebody come at you, *you don't say that they did*?" (Tr., p.329, Ls.10-11

(emphasis added)) – improperly risked eliciting a comment on Mr. Gonzalez's decision to invoke his rights rather than tell officers about the self-defense issue, and thus, make the inference of his guilt. As such, the prosecutor's questions were seeking to infer Mr. Gonzalez's guilt from his invocation, and so, that line of questioning was inappropriate.

Finally, the State contends that, even if the comment on Mr. Gonzalez's invocation was erroneous, that error was harmless. (Resp. Br., pp.15-16.) It bases that argument on the other evidence in the record, which it asserts would prove Mr. Gonzalez's guilt beyond a reasonable doubt despite the error. (Resp. Br., pp.15-16.) That argument is directly contrary to United States Supreme Court precedent.

When an error is objected-to below, Idaho employs the harmless error test established in *Chapman v. California*, 386 U.S. 18 (1967). *State v. Perry*, 150 Idaho 209, 221 (2010). The United States Supreme Court has made it clear that the *Chapman* test requires the reviewing court to look "to the basis on which 'the jury *actually rested* its verdict.'" *Sullivan v. Louisiana*, 508 U.S. 275, 279 (1993) (quoting *Yates v. Evatt*, 500 U.S. 391, 404 (1991) (emphasis from *Sullivan*). Thus, the question is "whether the guilty verdict actually rendered in *this* trial was surely unattributable to the error. That must be so, because to hypothesize a guilty verdict that was never in fact rendered—no matter how inescapable the findings to support that verdict might be—would violate the jury-trial guarantee." *Sullivan*, 508 U.S. at 279 (emphasis from original); *cf. State v. Joy*, 155 Idaho 1, 11 (2013) (recognizing this is the proper standard for harmless error review in Idaho). Therefore, as the United States Supreme Court has

made clear, "*no matter how inescapable the findings to support that verdict might be*," if the State has not shown, beyond a reasonable doubt, that this error did not contribute to the verdict actually rendered, the error is not harmless. *Sullivan*, 508 U.S. at 279 (emphasis added). As such, the State's harmless error argument which is that the conclusion of Mr. Gonzalez's guilty is inescapable because of all the other evidence in the record, is wholly inappropriate, and if adopted, would result in a violation of Mr. Gonzalez's constitutional right to a jury trial.

Since the State has not offered a valid argument as to why this error was harmless beyond a reasonable doubt, it has failed to carry its burden in that respect. *See, e.g., State v. Almaraz*, 154 Idaho 584, 598-99 (2013). Regardless of whatever other evidence was presented, the State has not proved the jury did not conclude precisely what the prosecutor intended for them to conclude – that Mr. Gonzalez hit Mr. Steele without justification due, at least in part, to the fact that he chose to request an attorney rather than tell the officers about the self-defense issue the night of the incident. (*See* Tr., p.331, Ls.1-7.) Therefore, there is a *reasonable possibility* the error contributed to the verdict actually rendered in this case. Thus, the error was not harmless.

## II.

## The District Court Abused Its Discretion By Not Ordering A Competency Evaluation To Be Removed From The PSI Materials

### A. This Issue Is Properly Raised On Appeal

The State contends that, because Mr. Gonzalez did not formally request the competency evaluation be removed from the PSI materials below, he cannot raise this

issue on appeal absent a showing of fundamental error. (Resp. Br., pp.18-19.) However, that argument ignores the fact that an issue may be raised for the first time on appeal when that issue was "decided by the trial court." *State v. DuValt*, 131 Idaho 550, 553 (1998) ("Since this issue was directly addressed by the trial court below, we will decide this issue on appeal."). In this case, the trial court directly addressed this issue, deciding it would not remove the competency evaluation based on its conclusion that it did not have the authority to do so. (Tr., p.417, L.4 - p.418, L.17.) Because the issue was directly addressed by the trial court below, the challenge to that decision is properly raised on appeal.

B. The District Court Had The Authority To, And So, Should Have Removed The Improper Competency Evaluation From The PSI Packet Prepared In This Case

On the merits of this issue the State asserts that the district court's decision – just to not consider the information itself – was a reasonable choice within the scope of its discretion. (Resp. Br., p.19.) However, the State does not respond to Mr. Gonzalez's contention that the district court nevertheless abuses its discretion when it acts without recognizing the full scope of its discretion. (App. Br., p.13 (citing *State v. Anderson*, 152 Idaho 21, 22 (Ct. App. 2011)).) In fact, the State acknowledges none of the previous decisions on this topic in advancing its argument. (*See generally* Resp. Br., pp.19-20.)

The Court of Appeals has made it clear that, not only does the district court have the discretion to remove such evaluations from the PSI packet prepared in this case, that is precisely the sort of action it should take: "In light of these concerns, the district court *should cross out the portions of the PSI referencing the competency evaluations* in violation of Jockumsen's Fifth Amendment right against self-incrimination, *detach the*

*competency evaluations from the PSI*, and *forward a corrected copy* to the Department of Correction." *State v. Jockumsen*, 148 Idaho 817, 823 n.3 (Ct. App. 2010). Therefore, regardless of the reasonableness of its decision to not consider the evaluation itself, the district court still abused its discretion because it acted without recognizing the full scope of that discretion.

Furthermore, the State's argument on the merits has already been rejected by the Court of Appeals: "[*I*]*t was insufficient to simply disregard the information at sentencing* and, instead, the court should also redline it from the PSI so that this information could not prejudice the defendant in the future." *State v. Carey*, 152 Idaho 720, 722 (Ct. App. 2010) (explaining the rule emerging from *State v. Molen*, 148 Idaho 950 (Ct. App. 2010) and *State v. Rodriguez*, 132 Idaho 261 (Ct. App. 1998)) (emphasis added). The problems caused by failing to do this do not relate to whether the future court or board reviewing the PSI packet would be aware the competency evaluation was removed (*see* Resp. Br., pp.19-20), though certainly, given the facts of this case, a reviewing authority presented with the old PSI packet and the PSI packet prepared for the present case would be able to see, had the district court redlined the information as the Court of Appeals has instructed, that a competency evaluation had been erroneously included in the old PSI packet. (*See* App. Br., p.16.) Rather, the problems arise from the fact that the evaluation remains in the PSI packet at all, and so, may be considered by a future evaluator. *See Rodriguez*, 132 Idaho at 262 n.1 (detailing the problems that arise when this sort of information is erroneously *left in* a PSI packet).

Since the district court decided to leave that competency evaluation in the PSI packet prepared in this case, the problems identified by the Court of Appeals continue

to exist in this case. Therefore, proper application of the controlling authority reveals that the district court did, in fact, abuse its discretion when it decided to leave that evaluation in the PSI packet prepared in this case.

## CONCLUSION

Mr. Gonzalez respectfully requests this Court vacate his judgment of conviction and remand this case for a new trial. He also requests that this Court instruct the district court on remand to order the competency evaluation stricken from his PSI information.

DATED this 1st day of March, 2016.

_____/s/_____
BRIAN R. DICKSON
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 1st day of March, 2016, I served a true and correct copy of the foregoing APPELLANT'S REPLY BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

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